IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7372 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

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MANUBHAI BAVBHAI KATHI...PETITIONER

Versus

STATE OF GUJARAT & 2 OTHERS...RESPONDENTS

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Appearance:

M/S THAKKAR ASSOC. for Petitioner

MR UR BHATT, AGP for Respondent No. 1, 2, 3

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CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 18/02/98

ORAL JUDGEMENT

By this application, under Article 226 of the Constitution of India, the petitioner who is the detenu, calls in question the legality and validity of the detention order, passed by the District Magistrate, Amreli, on 17th September, 1997 invoking powers under Sec.3(2) of the Gujarat Prevention of Anti-Social Activities Act (for short "the Act "); consequent upon which the petitioner came to be arrested, and at present

is under detention.

2. In order to appreciate the rival contentions, necessary facts in brief may be stated. The District Magistrate, Amreli, when perused different records of the Police Stations in the District found that about six complaints were lodged against the petitioner with Amreli Rural Police Station. In the first three complaints it was alleged that the petitioner had committed trespass and caused simple or grievous hurt. He had also abused persons and in one case, he also committed the offence punishable under section 307 of I.P.C. and also section 25(1) (c) of the Arms Act. In another three complaints, the petitioner was found in possession of 70 litres to 540 litres of country liquor, and necessary equipments for preparing liquor without any pass or permit and had thereby committed the offence punishable under section 66(1) (b), 65(c) and 65(d),(e),(f) of the Bombay Prohibition Act. The Commissioner of Police, having come to know about such complaints made detailed inquiry and after inquisition, the Police Commissioner also found that the petitioner was a head-strong person i.e. a tartar & decimator and by different criminal activities, he was terrorising the people. He was extorting money, causing injuries and/or causing damage to the properties. By diabolism, he used to cause the people to bend his way. His hellish and infernal activities disturbing public order and spreading pandemonium were going berserk. No one was, therefore, ready to come forward and state against him. After a great persuation and when assurance was given that the facts about them disclosing their identity would be kept secret, some of the witnesses have under great tension stated against the petitioner. After deep inquiry, the Police Commissioner found that to curb the anti-social, subversive and chaotic activities of the petitioner, unspeakable diabolism terrorising the society, and upsetting the public order and leading to anarchy, ordinary law was falling short and was sounding dull. The only way out to hold him in kittle was to detain him under the Act. He, therefore, passed the impugned order. Consequent upon the same, the petitioner came to be arrested and at present, is in custody.

3. On behalf of the petitioner, challenging the impugned order, it is submitted that the order in question is passed after a great delay, as a result, the continuous detention has been rendered illegal. There was no justification for the authority passing the detention order to withhold the opportunity, exercising the privilege under Sec.9(2) of the Act. The detaining

authority ought to have disclosed the particulars of the witnesses whose statements were recorded in support of the order passed. No doubt, under Section 9 of the Act, the authority has the privilege, but that is to be exercised judiciously, and not arbitrarily or capriciously so as to deprive the detenu of his right to have effective representation. As the particulars were not given, the petitioner was deprived of his right to have the effective representation against the order. The instances about the offences noted in the order were not sufficient to brand him a dangerous person, or to form a reasonable belief that maintenance of public order was adversely affected. The statements recorded are vague and necessary particulars when wanting the order is bad in law and is liable to be quashed.

4. Mr.U.R.Bhatt, the learned AGP has vehemently refuted the allegations made, submitting that there is no delay on the part of the authority passing the order of detention, promptly order was passed, and in the public interest, certain facts & particulars are withheld. As both later on confined to the only point, I will not dwell upon other points.

5. It would be better if the law about the non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention is passed are required to be communicated to the detenu. The detenu is, therefore, required to be informed not merely factual inference and factual material which led to inference namely not to disclose certain facts, but also the sources from which the factual material is gathered. The disclosure of sources can enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act, the detaining authority is of course empowered to withhold such facts and particulars, the disclosure of which he considers to be against the public interest. The privilege of non-disclosure has to be exercised sparingly and in those cases, where public interest dictating non-discosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view

to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well-founded for disclosing or not disclosing certain facts or particulars of those persons, the authority making the order has to make necessary inquiry applying his mind. What can be deduced from such constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether the disclosure of any facts involved therein is against public interest are both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If the task of recording statements and necessary inquiry is entrusted to others, and if he mechanically endorses or accepts the recommendation of others or subordinate authority in that behalf without applying mind and taking his own decision, the exercise of power would be vitiated as arbitrary. What is further required is that the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bonafide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed, the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power, the detenu may challenge the privilege exercised on the ground that the same is vitiated by factual or legal malafides. For my such view, a reference to a decision in the case of Bai Amina, W/o. Ibrahim Abdul Rahim Alla Vs. State of Gujarat and others- 22 G.L.R. 1186 held to be the good law by the Full Bench of this Court in the case of Chandrakant N. Patel Vs. State of Gujrat & Others 35(1) [1994(1)] G.L.R. 761, may be made.

6. In view of such law, the authority passing the order has to satisfy the Court that it was, in the public interest, absolutely necessary to keep particulars of the witnesses secret keeping the safety of the witnesses in mind. No affidavit has been filed by the Commissioner of Police who has passed the order without any good reason and therefore, this Court is entitled to infer everything against the authority passing the order, and it can be assumed that without any just and proper cause, the

privilege has been exercised. At this stage, it is submitted that the Commissioner of Police who has assigned the work of inquiry before exercising the privilege went through the reports made, and statements of the witnesses supplied to him and he then simply put up endorsement ` verified'. This is not in consonance with law. This Court in the case of Jakirbhai Rahimbhai Nagori v. District Magistrate, Mehsana & others, reported in 1996 (1) GLH 300 while dealing with the likewise question has held that by simply verifying the statements & report and putting the endorsement `verified', it cannot be said that the privilege exercised is in consonance with the law. Such endorsement on the contrary, shows that mechanically, the privilege was exercised without applying the mind to the papers placed before him and therefore, the privilege exercised can be said to have been vitiated, and consequently, the order of detention passed can be termed arbitrary and unconstitutional. In this case therefore, the order of detention passed is, in view of such law, arbitrary and unconstitutional and the same is required to be set aside and quashed.

7. It is made crystal clear by the Apex Court in the case of Pradeep Nilkanth Paturkar Vs. S. Ramamurthi and others, AIR 1994 SC 656 that if the detention order is passed after a long delay from the last offence registered or the statements of the witnesses lastly recorded, the order of detention on the ground of delay, is required to be set aside, if the delay prejudices the detenu. It is also made clear that delay ipso facto in passing an order of detention after an incident is not always fatal to the detention of a person, for in certain cases delay may be unavoidable and reasonable. What is required by law is that the delay must be satisfactorily explained by the detaining authority." In the case before Supreme Court, about five months and eight days after the last registration of the offence and four months after the statement which came to be recorded lastly, the detention order was passed, and so on the ground of delay, that detention order was quashed and the detenu was ordered to be set at liberty holding that delay had prejudicially affected detenu's rights.

8. In the case on hand, as per the statement before me, the last complaint came to be registered on 3rd April, 1997 and thereafter impugned order came to be passed on 17th September, 1997. The order is, therefore, passed about five months and 15 days after the last complaint came to be recorded. When there is such delay, and the same is not explained, in view of the aforesaid

decision of the Supreme Court in Pardeep Nilkanth Paturkar (supra), the impugned order cannot be maintained, being arbitrary & illegal.

9. For the aforesaid reasons, this petition is allowed. The order of detention passed on 17th September, 1997 by the District Magistrate, Amreli City, is hereby quashed and set aside, and the petitioner-detenu is ordered to be set at liberty forth with, if not required in any other case. Rule accordingly made absolute.

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Amp/-